STATE OF WISCONSIN PERSONNEL COMMISSION

SALLY McBEATH,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 82-119-PC

DECISION AND ORDER

The Commission adopts all portions of the Proposed Decision and Order issued in the above matter except Finding of Fact 41 and subsection B of the Opinion Section and replaces those portions with the language below. These changes in the proposed decision were made after consultation with the hearing examiner and are due to the Commission's conclusion that the interpretation of §HSS 328.22, Wis. Adm. Code, is the determinative issue in this matter.

FINDINGS OF FACT

41. The appellant's conduct on January 25, 1982, was not inattentive or negligent in that the appellant was not required to direct that Mr. Lange be placed in custody and the appellant did not fail to provide required information on that date.

OPINION

B. Merits

The Bureau had promulgated new rules specifying the procedure to follow in detaining or apprehending clients pending investigation. The old rules required the detention of a client with an assaultive record when an

agent became aware of an allegation that the client had been assaultive. However, the old policy was replaced on January 1, 1982 by a new administrative code provision which stated as follows:

> (1) A client shall be taken into custody and detained if the client has a record of prior assaultive or dangerous conduct and is arrested for any reason or is involved in assaultive or dangerous conduct. A regional chief may permit exceptions to this subsection.
> (2) A client may be taken into custody and detained:
> (a) For investigation of an alleged violation by the client; [or]
> (b) After an alleged violation by the client to determine whether to commence revocation proceedings;
> § HSS 328,22, Wis. Adm. Code.

1. Notice of the Rule

The appellant raised what was essentially an affirmative defense to the imposition of a suspension, arguing that she was not given a copy of the new administrative code provisions before the events of January 25, 1982 had taken place. While the facts suggest that the respondent agency may have been remiss in not providing copies of the new rules to its unit supervisors before late January, the appellant still had a responsibility as a supervisor to make an effort to obtain a copy of the rules on her own before that time. The record indicates that on or about December 22, 1981, the appellant was notified that as of January 1, 1982, the new rules would go into effect and that copies of the rules would be provided to each staff member "immediately after they are received from the Revisor." The record also shows that unit supervisors in the Southern Region (which included the West Badger Road Office) had, before January 1, 1982, "expressed concern" about being responsible for implementing the new rules without knowing what they were and without having been given any training on them. It is unclear from the record as to how the concern was expressed, to whom it was expressed and whether the appellant was one of the supervisors who

participated. Presumably, these questions would be answered if the appellant's motion challenging the sufficiency of the evidence were denied and the appellant were to put in her case in chief. If, for example, the appellant showed that she was one of a group of supervisors who clearly indicated to regional or central management the problems of operating without copies of the rules and without training, then the appellant's affirmative defense might well be established. However, for reasons expressed below and related to the language of §HSS 328.22, Wis. Adm. Code, the appellant's motion "for non-suit" will be granted, thereby leaving open the question of whether the appellant's affirmative defense based on lack of notice has merit.

2. The Rule's Language

It is the Commission's view that given the circumstances of this case §HSS 328.22, Wis. Adm. Code, did not require the appellant to order the apprehension/detention of Mr. Lange.

It is the respondent's position that the appellant, upon receiving information that Ms. Johnson had possibly been assaulted, should have ordered Mr. Lange apprehended or detained until such time that a full investigation could be conducted or should have obtained an exception to the detention rule from Mr. Kressin. Mr. Buehler testified that he was personally involved in the drafting of the new rules and that he intended § HSS 328.22, Wis. Adm. Code, to codify the policies found in Field Notices 80-8 and 80-11 and, specifically, that he intended § HSS 328.22(1) to require the detention of persons "involved or allegedly involved" in assaultive behavior as had been required under FN 80-8 and 80-11.

In reaching its conclusion, the Commission is aware that certain deference is to be given to the interpretation of a statute (or rule) made

by the agency charged with the duty of applying it. DOA v. WERC, 90 Wis. 2d 426 (1979). However, the agency's interpretation is only entitled to great weight if the administrative interpretation "is long continued, substantially uniform and without challenge by government authorities and courts." Milwaukee County v. EEOC, 52 Wis. 2d 58, 67 (1971). In the present case, the agency's interpretation has not been long standing and was apparently first stated sometime after the events of January 25th that form the basis for this appeal. It wasn't until July of 1982 that a written "interpretation" or clarification of subsection (1) specified that "involvement" was to be defined as including allegations of involvement and participation. The primary problem with the respondent's interpretation is that it fails to account for the difference in language between (1) and (2) of §HSS 328.22, Wis. Adm. Code. The rule differentiates between clients arrested or involved in assaultive behavior on one hand and clients merely alleged to have committed a violation on the other. The Commission concludes that the use of different terms or language in the rules indicates that the terms had different meanings.

In the present case, the Commission must only decide what the most reasonable interpretation of the rules would have been on January 25, 1982, if the appellant had consulted the rule in guiding her actions. As of that date, the appellant would have reasonably interpreted the rule's language to make the detention decision discretionary with the agent and unit supervisor when a client with an assaultive record had not been arrested and his involvement could not be substantiated but where the client had been alleged to have been assaultive.

The Commission concludes that there was no just cause for the imposition of discipline for her conduct on January 25, 1982. Section HSS 328.22, Wis. Adm. Code, provided the appellant with the discretion to decide whether or not to detain Mr. Lange. There is also nothing in the rule that required the appellant to obtain a detention waiver from her supervisor where detention was discretionary.[FN]

[FN] This decision does not include a review of the appellant's conduct in terms of a general theory of negligence. The suspension letter defined the appellant's alleged misconduct as a violation of a specific administrative rule rather than against a general standard of negligence. To judge the appellant now in terms of an unspecificed standard would go beyond the scope of the suspension letter.

Dated: July 7, 1983 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

KMS:jmf

LAURIE R. McCALLUM, Commissioner

Parties:

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STATE OF WISCONSIN PERSONNEL COMMISSION

SALLY MCBEATH,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES,

Respondent.

Case No. 82-119-PC

PROPOSED DECISION AND ORDER

This matter is before the Commission as an appeal from a five day suspension. At the hearing, after the respondent had completed its case in chief and before the appellant presented her case, the appellant moved for a non-suit, arguing that the respondent had failed to meet its burden of showing that there was just cause for the imposition of any discipline. The respondent agreed to brief the case based upon appellant's motion, so that if no just cause were found, the matter could be dismissed upon the existing record. However, if the Commission were to find just cause based upon the existing record, then the proceeding was to be reconvened in order to allow the appellant the opportunity to present her case.

FINDINGS OF FACT

1. At all times relevant to this proceeding, the appellant has been employed by the Department of Health and Social Services, Division of Corrections, Bureau of Community Corrections, as Unit Supervisor in the Bureau's West Badger Road office in Madison.

2. The Bureau is organized on a regional basis with a central administrative office. Ed Buehler is Bureau Director and Gus Kressin holds the position of Chief for the Southern Region. There are approximately seven units within the Southern Region, with each unit headed by a unit supervisor.

3. As unit supervisor, the appellant has responsibilities for supervising the unit staff and managing the office, implementing Bureau, Division and Department policies, developing community resources and representing the Division in the local community. Appellant's position description includes the following activities among thirty-one specified activities:

1. Review all written work to insure conformity to professional and Division standards.
2. Train unit staff to perform specific job function effectively, and arrange elsewhere for whatever other needed training.
3. Conduct unit meetings to information dissemination and problem solving.
4. Consult with agents to facilitate casework decisions such as revocation versus use of alternate placement.
5. Document employee performance which could result in disciplinary action.
6. Attend training seminars and supervisory conferences to update knowledge of policy and procedures.
7. Inform staff of correct procedures and monitor work to insure compliance with policy.

4. At the time that is relevant to this proceeding, the appellant supervised nine probation and parole agents and four clerical personnel.

5. On or about December 20, 1981, a client was added to the list of the persons served by the West Badger Road office. The client, Mr. Roger Lange, had been placed on two years probation as a result of pleading guilty to an offense of 4th degree sexual assault. He had initially been charged with a 2nd degree sexual assault of Tina Johnson, who had lived with Mr.

Lange for some years. However, Ms. Johnson refused to testify against Mr. Lange who then entered into a plea bargain on the lesser charge. A court order dated November 19, 1981 placed Mr. Lange on probation

> in the custody and control of the Department of Health and Social Services subject to its rules and orders and subject to the following conditions:
>
> 1. Defendant to undergo counselling as deemed necessary (psychological) as relates to abusive sexual conduct.
>
> 2. Defendant not to engage in any form of sexual assault against anyone in the community.

Notable by its absence in the court order was any condition barring any further contact between Mr. Lange and Ms. Johnson. Such a condition of probation is normal in sexual assault cases.

6. New clients in the Bureau are classified according to the degree of supervision required. As a consequence of the nature of his conviction, Mr. Lange was classified as being within the maximum category, thereby requiring at least two contacts between the probation and parole agent and the client, every month.

7. Mr. Ozzie Stern, a Social Worker 3 in the West Badger Road office, was assigned to be the agent for Mr. Lange.

8. Mr. Stern kept his supervisor, the appellant, fully abreast of the status of each of the approximately 50 probation clients he had been assigned.

9. The appellant was familiar with Mr. Lange's case history because Mr. Lange had previously been assigned to the appellant's unit during periods in the 1970's.

10. Until 1982, the departmental policies governing probation and parole clients were set out in a field manual, copies of which were provided to Bureau staff. A memo issued on January 31, 1980 by Mr. Buehler and designated Field Notice 80 - 8 acted to update the field manual regarding "Apprehension/Detention/Investigation/Revocation of Adult Offenders." The memo provided in part:

> To this end, the following departmental policy is effective immediately:
> 1. For all cases which have a record of behavior which has involved physical or sexual assault, possession, threat of or use of a weapon, or other conduct threatening to others and the agent becomes aware of an alleged violation which
>
> a. is assaultive and criminal charges are pending or;
> b. is assaultive and no charges are pending or;
> c. has resulted in an arrest for non-assaultive behavior;
>
> the client will immediately be detained pending a complete investigation by the agent. Any exceptions require the approval of the Regional Chief or Assistant Chief. (Emphasis added)

11. On March 7, 1980, Mr. Buehler issued Field Notice 80-11 for the purpose of clarifying various aspects of Field Notice 80-8. The March 7th memo made no substantive change in the required procedures quoted in Finding of Fact #10, other than clarifying that the word "detained" included the issuance of a detention hold (order) and/or an apprehension request (order).

12. An apprehension order is an official form completed by an agent or unit supervisor to pick up or apprehend a client. A detention order is used to authorize a jailer to hold the client for a period of time. A detention order can also be used to detain a client who has voluntarily appeared in the field office.

13. The exemption enjoyed by the Division of Correction from the administrative rule-making requirements set out in ch. 227, Wis. Stats., was removed, thereby forcing the Division to promulgate rules to replace its field manual. The rule-making process was eventually completed and ch. HSS 328, Wis. Adm. Code was to become effective on January 1, 1982.

14. In a memo dated December 22, 1981, Mr. Buehler informed all regional chiefs, assistant regional chiefs and unit supervisors as to the status of ch. HSS 328:

> The Revisor of Statutes has indicated that Sections HSS 328 and HSS 31 will be published and promulgated effective January 1, 1982. Copies of the Rules will be provided to each staff member immediately after they are received from the Revisor.
>
> HSS 328 (Field Supervision) shall be implemented, as written, effective January 1, 1982.

15. Prior to January 1, 1982, the unit supervisors in the Bureau's Southern Region had expressed their concern about being responsible for implementing the new rules without having been given any training on them.

16. In a memo to all Bureau staff dated January 21, 1982, and entitled "Internal Management Procedures Required to Operationalize Administrative Rules", Mr. Buehler stated:

> With the recent enactment of Administrative Rules, HSS 31 and HSS 328, it is important to recognize the implications of these rules relative to the former Probation and Parole Operations Manual. All field staff are advised that the Administrative Rules are to be used as the exclusive cite and reference for any actions to or on behalf of clients under supervision whose liberty and freedom are being restricted. The manual is no longer the appropriate source of justification for conduct related to clients.

* * *

> Individual copies of the Rules have been provided to each agent and supervisor so that they will be immediately available for reference. If additional copies are required, please let me know.
>
> Your immediate attention to this matter is expected and appreciated since the Rules now carry the full force and effect of law.

17. §§ HSS 328.22 (1) and (2), Wis. Adm. Code provides as follows regarding custody and detention:

> 1. A client shall be taken into custody and detained if the client has a record of prior assaultive or dangerous conduct and is arrested for any reason or is involved in assaultive or dangerous conduct. A regional chief may permit exceptions to this subsection.
> 2. A client may be taken into custody and detained:
>
> a. For investigation of an alleged violation by the client;
> b. After an alleged violation by the client to determine whether to commence revocation proceedings;
> c. For disciplinary purposes; or
> d. To prevent a possible violation by the client. (Emphasis added).

18. The appellant normally worked a four day work week, ten hours each day. She normally did not work on Fridays. During January of 1982, the appellant was on vacation on the 18th through 20th, worked on the 21st, had Friday the 22nd off, and was in the office during most of Monday the 25th.

19. The appellant did not receive a copy of ch. HSS 328, Wis. Adm. Code until at least January 25, 1982.

20. On January 26th, the appellant was informed, by a memorandum, that she would be responsible for teaching a portion of the chapter to other unit supervisors in the region during a training session scheduled for February 10, 1982. The day after the unit supervisor's conference, the appellant conducted a training session for her work unit regarding the new provisions.

21. On February 17, 1982, just a few days after the training session was completed, Mr. Kressin issued a memo which provided, in part:

> H.S.S. 328.04(2) "An agent shall abide by the department's administrative rules.
>
> This is interpreted to mean the agent is responsible for abiding by those rules which are made available to him/her. At this point in time he/she will be held responsible for Chapters 31 and 328.

22. Shortly after noon on January 22, 1982, Tina Johnson, Roger Lange's live-in girl friend, came into the West Badger Road Office and complained she had been sexually assaulted.

23. Because the appellant was off work on January 22nd, she first heard of Ms. Johnson's allegation at approximately 7:45 a.m. on Monday, January 25th when she was approached by Pauline Marty, a typist in the office. Ms. Marty informed the appellant that Ms. Johnson: 1) had come into the office on Friday; 2) was loud and somewhat hysterical; 3) claimed that Mr. Lange had tied her and sexually assaulted her; and 4) also claimed that she was bleeding from the rectum. Ms. Marty stated that Ms. Johnson refused to see another agent and waited for Mr. Stern who had been out of the office at the time. Ms. Marty stated that she could not verify that Ms. Johnson was bleeding rectally. Ms. Marty told the appellant that Ms. Johnson had been advised to contact a home for battered women but that, according to Ms. Johnson, the home had refused to help her. Ms. Marty also told the appellant that Ms. Johnson had been advised to contact her physician, but that the physician was not in and that Ms. Johnson failed to take the advice of the physician's nurse to report to a hospital emergency room.

24. At approximately 8:00 a.m., the appellant went to Mr. Stern's office and asked for his summary of Ms. Johnson's visit. Mr. Stern told the appellant that Ms. Johnson was waiting for him when he returned to his office at approximately 1:30 p.m. on January 22nd, and that, at that time, Ms. Johnson: 1) was calm; 2) claimed that Mr. Lange had tied her up and had sexually assaulted her and 3) was not willing to participate in a revocation proceeding and did not want Mr. Lange to go to jail. Mr. Stern informed the appellant that Ms. Johnson had turned down his recommendation that she inform the police of Mr. Lange's conduct. As of the time of his conversation with the appellant, Mr. Stern had not spoken with Mr. Lange about Ms. Johnson's allegations.

25. The appellant and Mr. Stern did not discuss whether departmental policy regarding detention or apprehension applied to the matter.

26. Mr. Stern proposed a plan to the appellant for dealing with Ms. Johnson's allegations. The plan included confronting Mr. Lange to see whether he would admit to assaulting Ms. Johnson and bringing the matter to the attention of Mr. Lange's psychologist who could then work jointly with Mr. Lange and Ms. Johnson. The plan did not call for obtaining an "apprehension order" to have the police pick up Mr. Lange in order to question him or for obtaining a detention order.

27. The appellant approved of Mr. Stern's plan and understood that Mr. Stern would talk to Mr. Lange as soon as possible. The following considerations were also known to the appellant at the time the plan was approved: 1) The appellant had never previously known of the home for battered women refusing to help someone; 2) the appellant was aware that Mr. Lange had a history of sexually abusing his long term live-in girl

friends without seriously injuring them. The women would never cooperate or follow through after they alleged they had been abused.

28. Mr. Lange was already scheduled to see Mr. Stern on January 26th. However, Mr. Lange showed up in Mr. Stern's office later in the morning on January 25th. At that time, Mr. Lange denied engaging in any sexually assaultive behavior. After the meeting, Mr. Stern advised the appellant of what had occurred.

29. On March 4, 1982, Mr. Stern filed a situation alert with Mr. Kressin about Mr. Lange. A situation alert is used to advise the department's administration when the bureau is involved in a situation that could generate adverse publicity. The alert stated, in part:

> Current Supervision:
>
> On 11-19-81, Judge Mark Frankel, Dane County Circuit Court, Branch 12, withheld sentence and placed Roger Lange on probation for a period of two (2) years for the offense of 4th Degree Sexual Assault in violation of §§ 940.225(3) dated 7-11-81. No Pre-Sentence Investigation was ordered even though the charge was reduced from Second Degree Sexual Assault. As conditions of probation; (1) defendant to undergo counseling as deemed necessary; (2) defendant not to engage in any form of sexual assault against anyone in the community.
>
> Case Problems & Supervision Plan:
>
> * * *
>
> Mr. Lange was referred to Dr. Ken Lerner, Clinical Psychologist. Roger had been maintaining his maximum supervision schedule with Dr. Lerner and with agent. We suspected that unusual sexual acts were continuing between Roger and his fiancee, Tina Johnson. They shared residence at 2201 Cypress Way, Madison. On 1-22-82 Tina reported being sexually abused by Roger but refused to testify, write a report or report the incident to the police. She was advised to move out and file charges. Although Roger denied coercing Tina into any unusual sexual behavior. Agent advised Roger that this type of behavior could result in a 2nd Degree Sexual Assault charge and a possible lengthy prison sentence. Client's most recent face to face contact with agent and Dr.

> Lerner was on 3-2-82 at about 10:30 a.m. No unusual behavior or problems were noted.
>
> This was discussed with Supervisor, Sally McBeath and Dr. Ken Lerner. The relationship between Roger and Tina then seemed to improve.

The alert went on to indicate that Mr. Lange had been arrested as a murder suspect. Copies of the alert also went to Mr. Buehler and Division of Correction Director Cady.

30. After receiving the document Mr. Cady did not ask that any disciplinary action be taken and Mr. Buehler concurred that there was no need to take disciplinary action.

31. Mr. Buehler subsequently received additional information regarding the January 22nd incident. Mr. Buehler was advised that Ms. Johnson had been in the West Badger Road office, that she alleged she was tied up and raped vaginally and anally and that she was bleeding anally at the time.

32. An investigation was conducted regarding the appellant's actions in response to the January 22nd incident. After holding a predisciplinary hearing, Mr. Buehler issued a letter of suspension dated April 30, 1980, suspending the appellant for five days. The letter stated, in part, that the appellant was:

> negligent in carrying out the instructions and directions of Field Notice 80-11 with regard to correctional client, Roger Lange on or about January 25, 1982. Further, that you failed to advise the Regional Chief on the issue of an alleged violation on the part of Mr. Lange, for the purposes of securing a detention waiver, as required in the Field Notice 80-11.

33. On May 14, 1982, an amended letter of suspension was issued to the appellant which voided the April 30th letter and provided the following notice of a five day suspension:

> This correspondence shall serve as your official notice of Suspension Without Pay for five (5) working days, effective Monday, May 10, 1982 through Friday, May 14, 1982. It supersedes the April 30, 1982 suspension letter

that is hereby voided. This action is predicated on your violation of the following departmental Work Rules:

1. Disobedience, insubordination, inattentiveness, negligence or refusal to carry out written or verbal assignments, directions or instructions.

2. Failure to provide accurate and complete information when required by management or improperly disclosing confidential information.

* * *

[I]t was established that on January 22, 1982 Ozzie Stern received information that Roger Lange had engaged in assaultive and dangerous conduct. Mr. Stern did not take Lange into custody. On January 25, 1982, you were informed of Mr. Lange's conduct and that he had not been placed in custody as required by sec. 328.22, Wis. Adm. Code. You failed to direct that Lange be placed in custody and failed to advise the regional Chief of the situation for the purpose of securing a detention waiver as required by sec. 328.22, Wis. Adm. Code.

34. On June 24, 1982, the Bureau issued a document for the purpose of clarifying § HSS 328.22, Wis. Adm. Code. The document provides, in part:

Violation/Arrest (Assaultive/Dangerous Client)

If, during the period of supervision a client designated as assaultive/dangerous is arrested and/or involved in assaultive or dangerous conduct, the agent must consider the following guidelines in deciding whether or not the client shall be detained.

Guidelines.

1. If the client has been arrested:

* * *

2. If the client participated in physical or sexual assault on another person.

3. If the client was involved in dangerous conduct, i.e., threat or use of weapon or any act that has the potential of physical harm to person or persons. This would include verbal threats if there has been a history of carrying out such verbal threats. (Emphasis added)

40. On July 13, 1982, Mr. Buehler issued another memo clarifying § HSS 328.22, Wis. Adm. Code, which stated, in part:

> II. Violation/Arrest
>
> A. An assaultive/dangerous client must (shall) be detained if:
>
> 1. The client has been arrested, or;
>
> 2. The client is alleged to have participated in physical or sexual assault on another person, or;
>
> 3. The client is alleged to have been involved in dangerous conduct, i.e., threat or use of weapon or act that has the potential of physical harm to person or persons. This includes verbal threats if there is a history of carrying out such threats. (Emphasis added)

41. The appellant's conduct on January 25, 1982 was not inattentive or negligent, and the appellant did not fail to provide required information on that date.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(c), Wis. Stats.

2. The respondent has the burden of proving that there was just cause for the five-day suspension of the appellant for violating departmental work rules.

3. The respondent has failed to sustain that burden.

4. Just cause did not exist for the imposition of discipline against the appellant.

OPINION

A. Procedural Matters

In appeals brought under §230.44(1)(c), Wis. Stats., from the imposition of discipline, the burden of proof is on the respondent agency to show that there was just cause for the discipline imposed. Reinke v. Personnel Board, 53 Wis. 2d 123 (1971). However, at the conclusion of the respondent's presentation of evidence in the instant case, the appellant moved for an order rescinding the discipline against the appellant. The appellant argued that the respondent had failed to meet its burden of establishing just cause and that the presentation of the appellant's case was unnecessary. The parties agreed that the Commission would issue a decision based upon the existing record. If the decision concluded that the respondent had failed to meet its burden then the decision would be the final administrative decision. If the Commission reached a different conclusion, then the hearing would be reopened so that the appellant could proceed with her case. As was noted in the appellant's brief, "[a] stipulation was reached allowing the Commission to render its decision based upon this motion regardless of whether the rules allow for such a motion."

In its brief, respondent suggests that appellant's motion was, in effect, a motion to "test the sufficiency of evidence" as may be granted in civil proceedings under §805.14(1), Wis. Stats., entitled, "Motions challenging sufficiency of evidence; motions after verdict." However, in light of the fact that the matter was not tried before a jury, the Commission finds that §805.17, Wis. Stats., provides a preferable statutory basis for considering the appellant's motion:

> 805.17 Trial to the court. (1) MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff on that ground or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in sub. (2). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section operates as an adjudication upon the merits.

Consistent with its position that appellant's motion was best described in §805.14 (1), Wis. Stats., the respondent also suggested that the Commission adopt the standard found within that section:

> No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made there is no credible evidence to sustain a finding in favor of such party.

However, in the case of Household Utilities, Inc. v. Andrews Co., 71 Wis. 2d 17 (1976), the Wisconsin Supreme Court determined that a different standard is to be applied when there is no jury:

> A challenge to the sufficiency of the evidence, of course, requires that some quantum determination be made with respect to the facts in the case. Where the case is tried to a jury, the court's ruling is necessarily limited to a determination of whether there is a dispute as to the facts or whether conflicting inferences might be drawn from the facts as presented. In this respect, a motion for nonsuit is equivalent to a motion for directed verdict. The court may grant neither unless it finds, as a matter of law, that no jury could disagree on the proper facts or the inferences to be drawn therefrom; and that there is no credible evidence to support a verdict for the plaintiff. This approach is necessary to preserve the litigant's right to a jury trial.

> Where there is no right to a jury trial, or where that right has been waived, however, the court itself is the ultimate finder of fact. In such a case there appears to be no good reason to view the evidence in the light most favorable to the plaintiff or to seek inferences from the facts which, under some view, might support plaintiff's claim. The plaintiff has the burden, in most cases, to present facts which will support his claim to relief. When he has rested it is to be presumed that all evidence favorable to that claim has been presented. Theoretically, his case will never be stronger than at that point. As a result, a ruling granting the motion to dismiss should constitute a disposition of the case on its merits. The findings of a trial court sitting without a jury will not be set aside on appeal unless they are contrary to the great weight and clear preponderance of the evidence. This court need not, on such an appeal, view the evidence in the light most favorable to plaintiff or draw inferences therefrom which might, under some view, support his claim. 71 Wis. 2d 17, 24-25 (Citations omitted, emphasis added)

The role of the hearing examiner in a case before the Commission is both as an arbiter of the law and as the trier of fact. The examiner's role is not limited to matters of law as is true of a judge in a jury trial, but is much more similar to the role of a judge in non-jury cases. The fact that the Commission may revise an examiner's proposed findings of facts does not make the Commission the equivalent of a jury in a jury trial. Therefore, the Commission finds that the standard applicable to non-jury trials is the appropriate standard to be applied with respect to appellant's motion regarding the sufficiency of the evidence.

B. Merits

Timing is a critical element of the instant appeal. The Bureau had promulgated new rules specifying the procedure to follow in detaining or apprehending clients pending investigation. The old rules required the detention of a client with an assaultive record when an agent became aware of an allegation that the client had been assaultive. However, the old policy was replaced on January 1, 1982 by a new administrative code provision which stated as follows:

> (1) A client shall be taken into custody and detained if the client has a record of prior assaultive or dangerous conduct and is arrested for any reason or is involved in assaultive or dangerous conduct. A regional chief may permit exceptions to this subsection.
> (2) A client may be taken into custody and detained:
> (a) For investigation of an alleged violation by the client; [or]
> (b) After an alleged violation by the client to determine whether to commence revocation proceedings;
> § HSS 328,22, Wis. Adm. Code

In the present case, Tina Johnson alleged on January 22, 1982, that she had been assaulted by Mr. Lange. The appellant was out of the office that day, so she first heard about the allegation on January 25th, three days later. By that time, agent Stern had spoken with Ms. Johnson and developed a plan of action. As of the time that she was first made aware of Ms. Johnson's allegation, the appellant had not seen a copy of the new administrative rules that had gone into effect on January 1, 1982, nor had she been given any training on the new rules. It is unclear precisely when the appellant first obtained a copy of the ch. HSS 328. However, testimony indicates that receipt would not have occurred before the morning of January 25th. Even if one concludes that the appellant had the rules in her possession at 8:00 a.m. on the 25th, there is no basis for finding that she had an opportunity to study the rules that day. It is undisputed that the appellant was not aware of the new rules' content on the 25th.

The evidence suggests that it wasn't until February 10th, 1982 after completing a training session with other unit supervisors in the region, that the appellant was in a position to be responsible for knowing and correctly applying ch. 328. The witness then trained her staff on the following day. It was not reasonable for the Bureau to expect its staff to correctly apply rules before copies had been received and training provided.

This expectation had been a source of concern by staff in the Southern region prior to January 1st.

The respondent argues that the appellant had a responsibility for calling her supervisor, region chief Kressin, for answers to any questions during the period when the rules were legally in effect but while she still had no copy and/or had not been trained. There was no evidence that the appellant was ever advised of the responsibility for contacting Kressin. In addition, testimony indicated that it would have been extremely impractical for all the unit supervisors in the region to have forwarded all questions in their units to Mr. Kressin during the three to six week period.

Even if the appellant were found to have been familiar with the new rules at the time of her discussion with Mr. Stern on January 25, 1982, the respondent has failed to convince the Commission that the rule would have required the apprehension/detention of Mr. Lange. It is the respondent's position that the appellant, upon receiving information that Ms. Johnson had possibly been assaulted, should have ordered Mr. Lange apprehended or detained until such time that a full investigation could be conducted or should have obtained an exception to the detention rule from Mr. Kressin. Mr. Buehler testified that he was personally involved in the drafting of the new rules and that he intended § HSS 328.22, Wis. Adm. Code, to codify the policies found in Field Notices 80-8 and 80-11 and, specifically, that he intended § HSS 328.22(1) to require the detention of persons "involved or allegedly involved" in assaultive behavior as required under FN 80-8 and 80-11. However, an analysis of the language of the rule indicates that it differentiates between clients arrested or involved in assaultive behavior on the one hand and clients merely alleged to have committed a violation on

the other. It wasn't until July of 1982 that a written "interpretation" or "clarification" of subsection (1) specified that "involvement" was to be defined as including allegations of involvement and participation. The Commission is not in a position to issue a binding interpretation of § HSS 328.22(1), Wis. Adm. Code, in light of the clarifications as to its meaning that were issued subsequent to the rules promulgation. However, as of January 25, 1982, the most reasonable interpretation of the rule's language was to make the detention decision discretionary with the agent and unit supervisor when a client with an assaultive record had not been arrested and his involvement could not be substantiated but where the client had been alleged to have been assaultive.

Testimony showed that the appellant exercised her discretion reasonably in not ordering the detention of Mr. Lange on January 25th. In responding to the events of January 22nd as she knew them, the appellant understood the following facts: 1) Three days had passed between Friday and Monday and Ms. Johnson had made no further complaint; 2) Ms. Johnson was uncooperative, would never testify against Mr. Lange, and had been refused assistance by the home for battered women; 3) the probation order issued by the court had not prohibited association between Ms. Johnson and Mr. Lange, even though such an order is normal in assault cases; 4) Mr. Lange and his live-in girl friends exhibited a pattern of behavior suggesting that the women were accomplices to any improper behavior by Mr. Lange and that the women would never testify against Mr. Lange. The appellant also expected that Mr. Stern would contact Mr. Lange as soon as possible in order to complete the investigation into Mr. Lange's allegations.

Under §328.22(1), Wis. Adm. Code, the appellant would have had the discretion to order the detention of Mr. Lange until an investigation could be completed. However, the appellant's decision not to detain Mr. Lange also fell within the scope of the discretion permitted by the rule.

The respondent's failure to initiate disciplinary action after the issuance of the March 4th situation is an additional factor supporting the finding of no just cause. After reviewing the situation alert, Mr. Cady did not ask that any disciplinary action be taken and Mr. Buehler concurred that there was no need to take disciplinary action. The respondent later initiated an investigation after receiving additional information about the incident. However, the additional information did not tend to substantiate that an assault had occurred: the information merely consisted of more serious allegations than the information found within the situation alert. Even though the allegations were more serious than previously known, there is no basis within §328.22, Wis. Adm. Code for differentiating between the seriousness of allegations, except within the grant of discretion found in subsection (2).

The Commission concludes that there was no just cause for the imposition of discipline against the appellant for her conduct on January 25, 1982. The respondent failed to establish that the appellant had violated either of the two work rules quoted in the letter of suspension. The respondent failed to provide copies of ch. HSS 328 to the appellant or to provide training as to the new provisions before the events of January 25th. On its face, § HSS 328.22, Wis. Adm. Code, provided the appellant with the discretion to decide whether or not to detain Mr. Lange on January 25th. The appellant exercised her discretion in a reasonable manner. Therefore, the appellant cannot be considered to have been inattentive or negligent in not detaining Mr. Lange under the authority of § HSS 328.22, Wis. Adm. Code. There is also nothing in § HSS 328.22 that required the appellant to obtain a detention waiver from her supervisor where detention was discretionary.

ORDER

The appellant's motion is granted, the respondent's action is reversed and this matter is remanded to the respondent for action consistent with this decision.

Dated: _____, 1983 STATE PERSONNEL COMMISSION

KMS:lmr

_____
DONALD R. MURPHY, Chairperson

_____
LAURIE R. McCALLUM, Commissioner

_____
JAMES W. PHILLIPS, Commissioner

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